No. 2675

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

WESTERN UNDERWRITING & MORTGAGE COMPANY, a Corporation, *Appellant.*

vs.

THE VALLEY BANK OF PHOENIX, a Corporation, and THE UNION BANK AND TRUST COMPANY, a Corporation, *Appellees,*

Brief of Appellee

C. F. AINSWORTH,
Phoenix, Arizona.

JOS. H. KIBBEY,
Phoenix, Arizona.

Solicitors for Appellee,
The Valley Bank of Phoenix.

United States Circuit Court of Appeals for the Ninth Circuit.

WESTERN UNDERWRITING & MORTGAGE COMPANY, a Corporation, *Appellant.*

vs.

THE VALLEY BANK OF PHOENIX, a Corporation, and THE UNION BANK AND TRUST COMPANY, a Corporation, *Appellees,*

BRIEF OF APPELLEE

STATEMENT OF CASE.

This is an action by the appellant, a California corporation, against the appellees, two Arizona corporations, to have adjudged fraudulent and void that certain contract bearing date the 30th day December, 1913, made by and between the appellees herein and set out in full (at pages 31-35, Transcript of Record) except the Schedule A, and to recover of the Appellee, the Valley Bank of Phoenix, the property set out in said Schedule A or its value. Also to have adjudged fraudulent and void that certain promissory note bearing date May 13th, 1913, executed by the Appellee, The Union Bank and Trust Company to the Valley Bank of Phoenix for $164,432.46, being the same note mentioned and described in said contract of December 30, 1913 above referred to. The appellant alleges as jurisdictional facts authorizing it to maintain this action in the court below

that it is the owner of 472 shares of preferred stock in the said Appellee, the Union Bank and Trust Company, and that said preferred stock has no voting power, that the fraudulent and void actions taken by the voting stockholders of the common stock of the said Union Bank and Trust Company and the Directors thereof, has made the preferred stock of the Appellant and others similarly situated valueless. (Transcript of Record, folio 13, page 17.) That the appellant had, prior to bringing this action, made written demand on the representatives of the appellee, The Union Bank and Trust Co., to bring appropriate proceedings against the Valley Bank of Phoenix to recover the property transferred to it by said contract of Dec. 30, 1913, and the cancellation of said $164,432.46 note, that said officers had refused to bring such action, and that it would be useless to apply to to the stockholders of the common stock to have such action brought, for the reason that one W. L. Rosa, the owner of a majority of the voting common stock, would, if a stockholders' meeting was called for the purpose of instructing the directors of The Union Bank and Trust Company to bring such action that said Rosa would vote against said resolution (Transcript of Record, folio 14, pages 18 and 19). The appellant alleges the making of the contract of January 27, 1912, between the appellees and the sureties therein mentioned, set out in full (Transcript of Record, folios 19-20-21, pages 25 to 28), and its construction of the same. Also the making of the contract of Dec. 30, 1913, between the appellees, and the making of the note in said contract set forth, and its construction of the same. The answer of the appellee, The Valley Bank of Phoenix, admite the making of the two contracts set out in the Bill of Complaint, also the making of the note by the appellee, The Union Bank and Trust Company, set out in the bill of complaint, and specifically denies all the other allegations of the bill of complaint, and then sets forth the

construction of said contracts by the respective parties thereto and their operation thereof. Alleges an accounting between the appellees in the month of May, 1913, on the contract of January 27, 1912, and that in such accounting there was then found unpaid and owing to The Valley Bank of Phoenix from The Union Bank and Trust Co. the sum of $164,432.46, and which amount would be due and payable on January 27, 1915, and thereupon a note for said amount was given by the Union Bank and Trust Co. to The Valley Bank of Phoenix. It also alleged the payment of all the debts it had agreed to pay by said contract of January 27, 1912, and at the time of filing said answer, to-wit: February 23, 1915, there was due and unpaid to this appellee, The Valley Bank of Phoenix, in accordance with the terms of said contract of January 27, 1912, from the guarantors and sureties thereon the sum of $79,774.97. (Transcript of Record, folios 50 to 63, pages 63 to 77.) At the close of appellant's case on the trial thereof, the Court rendered the following judgment:

(Title of Court and Cause.)

The above entitled action coming on duly to be tried before the above court, the Hon. William H. Sawtelle, presiding without a jury, on the 14th day of April, 1915, the complainant appearing by George J. Stoneman, Esq., attorney and solicitor, and E. J. Henning, Esq., attorney and solicitor; and the defendant, The Valley Bank of Phoenix, appearing by C. F. Ainsworth, Esq., its attorney and solicitor; and the defendant, The Union Bank and Trust Company, appearing by Struckmeyer & Jenckes, Esqs., its attorneys and solicitors; and the said plaintiff having duly submitted to this court its evidence and testimony in support of the allegations of its complaint herein, and having duly rested its case, and the

defendant, The Valley Bank of Phoenix, having by its attorney and solicitor duly moved this court for the dismissal of the said action, for the reason that the said plaintiff herein had failed to establish the allegations of said complaint herein, and that the evidence and testimony submitted by said plaintiff was not sufficient to sustain the allegations of its complaint nor to entitle it to any relief as against the said defendant, The Valley Bank of Phoenix, and it appearing to the satisfaction of this court that the evidence and testimony submitted by the plaintiff was not sufficient to support the allegations of its complaint nor to entitle it to any relief as against the defendant, The Valley Bank of Phoenix, and that the motion to dismiss made by said defendant, The Valley Bank of Phoenix, should be granted,

NOW THEREFORE,

It Is by the Court Considered Ordered and Adjudged, that the complaint herein, be and the same is hereby dismissed, and that the plaintiff take nothing by its said action;

It Is Further Ordered, Adjudged and Decreed that the defendant, The Valley Bank of Phoenix, have and recover of and from the plaintiff, The Western Underwriting & Mortgage Company, its costs and disbursements herein, hereby taxed and allowed in the sum of $81.10, and that said defendant have execution therefor.

Dated, this 14th day of April, 1915.

WM. H. SAWTELLE,
Judge of the District Court of the United States, in and for the District of Arizona.

ARGUMENT AND AUTHORITIES.

The appellee, The Valley Bank of Phoenix, will con-

sider the errors assigned by the appellant under two heads.

First.

The error assigned by appellant that the trial Court erred in denying complainant's motion to strike from the amended answer of The Valley Bank certain portions thereof as set forth (Transcript of Record, folios 95 to 106 inc.).

Second.

The error assigned by appellant "that the trial Court erred in entering its decree in favor of the defendants and against the complainant, as therein before set forth.

The trial Court, in denying the appellant's motion to strike from the amended answer of The Valley Bank those portions referred to in appellant's first assignment or errors herein, thereafter on the trial stated his views of the contract of January 27, 1912, as follows: "It seems to me from the discussion that was had when the demurrers were argued, or rather the motion to strike was argued, the construction and the opinion that I got at that time from the reading of the contract originally entered into, the one of January 27, 1912, that it might well be construed as the parties afterwards did construe it,—that is to mean a security for a debt. It is most unusual for a person who buys property, notes and securities outright, to take one as a guarantee for them, guaranteeing the purchaser against loss, and it seems to me if this case were to proceed that the defendant would be allowed to introduce testimony to show what the real transaction and agreement was. But aside from that, I am of the opinion that in this case the plaintiff corporation, in entering into the contract of December 30, 1913, as it had a right to do, recognized the transaction, the original transaction as a security for an indebtedness, and that the stockholders of the corporation, including the plaintiff who sues on its behalf, are bound

by that contract." (Transcript of Record, folios 41-42, page 160.)

We submit that the contract of January 27th, 1912, shows upon its face that the assets therein transferred to The Valley Bank of Phoenix were transferred as security in connection with the guarantee of the directors of The Union Bank and Trust Company, in their individual capacity to make good to the Valley Bank any deficiency it might sustain by reason of its inability to realize on the securities turned over to it by The Union Bank and Trust Company, sufficient money to repay the Valley Bank the amount it paid to the creditors of said Union Bank and Trust Company. There are three parties to this contract, The Union Bank and Trust Company and its guarantors on the one side, and The Valley Bank on the other. The Union Bank and Trust Company transferred, assigned, delivered and set over to The Valley Bank certain property to-wit: Cash, negotiable paper, bonds, stocks, etc., and the directors personally guaranteed to pay to The Valley Bank of Phoenix any deficiency which should remain at the end of three years from January 27, 1912, unpaid, after applying all of the cash received and collected, and all securities collected and reduced to cash upon the amount of the *indebtedness* of the party of the first part (viz: The Union Bank and Trust Company), which said party of the third part (viz: The Valley Bank) has paid or will be obliged to pay under the terms of the compact; and said second parties agreed to *repay* to said Valley Bank all costs and expenses which said Valley Bank should incur in reducing said assets to cash or in collecting the moneys due on such securities and evidences of indebtedness as are collectible. (Transcript of Record, folios 19-20, page 26.) On the other hand, The Valley Bank, in consideration of the *delivery to it of the assets,* and the execution of the agreement by The Union Bank and Trust Company and the guarantors, agreed to

pay all of the specified debts, as were designated in an Exhibit A, and in case of a deficiency being paid by the guarantors or any of them, to The Valley Bank, then it would re-assign to such guarantors all of the assets in its hands that had not been reduced to cash. (Transcript of Record, folio 21, page 27).

It seems clear from the language used in that part of the contract of the guarantors, in which they expressly describe their *guaranty* for the *payment of an indebtedness* of their principal, The Union Bank and Trust Company, which The Valley Bank shall pay under the terms of said contract, that The Union Bank and its directors as guarantors were securing The Valley Bank *absolutely* for all moneys it should pay out in liquidation of The Union Bank's indebtedness under the terms of said contract. There never was any doubt in the minds of the officers and directors of either The Union Bank and Trust Company or of The Valley Bank of Phoenix as to the purpose and meaning of the contract of January 27, 1912.

The officers and directors of The Union Bank and Trust Co., all of which officers and directors, except John P. Orme, were different from the officers and directors of The Union Bank at the time of the making of the contract of January 27, 1912, did on December 30, 1913, by contract in writing, in pursuance of a resolution of its board of directors, duly given and adopted at a meeting called for that purpose, construe said contract of January 27, 1912, and stipulated that, at that time there was an indebtedness from the Union Bank and Trust Co. to The Valley Bank under said contract of January 27, 1912, of $103,000.00, which would exceed the probable value of the securities then held by said Valley Bank under said agreement of January 27, 1912, in the estimated sum of $75,000.00. (Transcript of Record, folios 24 to 28 inc., pages 31 to 35.)

We therefore submit that the trial Court was correct

in denying appellant's motion to strike out portions of The Valley Bank's answer specified in appellant's error No. One, and in support of the trial Court's ruling we submit the following authorities:

Jones on Evidence, Pocket Edition, Sec. 446 and 447.
Peugh vs. Davis, 96 U. S. 332-336.
Brick vs. Brick, 98 U. S., 514-516.
Bunyan vs. Siligman, 107 U. S., 20-32.
Cabera vs. American Colonial Bank, 214 U. S., 224 on 230-231.

The above authorities state the rule as follows: "It has long been the settled rule that in courts exercising equitable jurisdiction it is admissable to prove by parole that instruments in writing apparently transferring the absolute title are in foct only given as security. The intention of the parties must govern ; and it matters not what peculiar form the transaction may have taken. the inquiry always is was a security for the loan of money or other property intended. In arriving at the real intention of the parties, their statements and acts at the time of the transaction, the prior existence of a debt, and the recognition of its continuance, as by the payment of the interest or other acts, are all facts to be considered and are relevant to the issue." From the foregoing authorities it must be apparent to this court that all of the allegations attempted to be stricken out were properly pleadable for the reason that they were allegations showing the real intention of the parties at the time said contract of Jan. 27, 1912, was entered into and the purpose for which said contract was executed.

We will consider Complainant's Assignment of Error, that the Trial Court erred in holding that the evidence and testimony submitted by the plaintiff was not sufficient to support the allegations of its complaint, nor to entitle it to any relief as against the defendant, The Valley Bank of Phoenix, and rendering judgment dis-

Morgan's vs. Shinn, 15 Wall. 105;
Sawyer vs. Turpin, 91 U. S. 114 on 119;
Hughes vs. Edwards, 9 Wheaton, 489 on 495.

missing the bill of complainant, and that the Valley Bank recovering the complainant's costs and disbursements.

This is a suit by the corporation, The Union Bank and Trust Company, although brought in the name of the complainant alleged stockholders, because the corporation refused to bring the suit.

The principal evidence introduced by the appellant in the trial court, that we will consider is that of the witness Sidney H. Stewart, who certified to certain prices of property including the Union Bank furniture and fixtures, and securities that were turned over to the Valley Bank under both contracts, that the officers of the Union Bank after the contract of Jan. 27, 1912, assisted in reducing the securities turned over to the Valley Bank to cash, that the officers of the Union Bank always contended it was to their interest to get the notes liquidated and cut down its indebtedness as quickly as possible, that the officers of the Union Bank and Valley Bank held meetings and went over the assets at various times, that at the time of the trial of this action (which was subsequent to the 3-year expiration of the Jan. 27, 1912, contract) The Valley Bank had converted $364,-631.67 of assets and paid out $430,783.59. That the furniture and fixtures was put up as collateral the same as the notes and securities. (Transcript of Record, folios 106 to 111, inc., pages 126-132).

All of the other evidence in the record tends to show that the complainants were not the owners of any common stock of The Union Bank and Trust Company. Also their endeavors to have the corporation bring this suit.

The evidence of Sidney H. Stewart clearly establishes, first, that the cash and security turned over to the Valley Bank by the Union Bank under contract of Jan. 27, 1912, was turned over and received by the Valley Bank as security and that both parties to that contract, from the date thereof so treated such security;

second, that at the expiration of said contract of Jan. 27, 1912, there was due the Valley Bank as per the terms of said contract a deficiency of $66,151.92; third, that after the application of all the assets by the Valley Bank turned over to it under contract of Dec. 30, 1913, there would still remain a deficiency of about $36,000 due it under the contract of Jan. 27, 1912.

The question is who is to pay the Valley Bank this deficiency, we say, first the Union Bank must pay it to the extent of the property it turned over under the contract of Jan. 27, 1912, and the property turned over to the Valley Bank under contract of Dec. 30, 1913, and then, and not until then, the guarantors will be obligated to pay the Valley Bank such deficiency as then may be after the application of all of said securities, (In this connection I may be permitted to state that on account of the bringing of this suit none of the assets turned over under the contract of Dec. 30, 1913, have been applied by the Valley Bank to the payment of the deficiency due it.)

If it be claimed by the appellant that the guarantors are the parties to pay this deficiency to the Valley Bank, then and in that event such guarantors would have the right to recover of their principal, the Union Bank, out of any property it might have, sufficient to indemnify them to the extent of their liability, and the directors of the Union Bank and Trust Company, realizing as they did on Dec. 30, 1913, that there was sure to be a deficiency of a large amount to be paid the Valley Bank under the contract of Jan. 27, 1912, they as such directors not only had the right but it was their duty as officers of the Union Bank, to turn over to the Valley Bank as further security, the assets which they did turn over under the contract of Dec. 30, 1913, and the Valley Bank having received such securities it is its duty to apply the same as designated in the contract of Dec. 30, 1913, for the protection of the sureties and guarantors.

The appellant's evidence in the record further shows, after applying all the assets and securities for which this action is brought, at their face value, there will still remain a *deficiency due the Valley Bank under both contracts of over* $36,000. We respectfully submit that the real complainant herein, The Union Bank and Trust Company, cannot under any theory of this case, recover of The Valley Bank of Phoenix, the securities turned over to it under the contract of December 30, 1913, until it has first repaid the Valley Bank the deficiency due it on account of the debts of said Union Bank and Trust Company, paid by said Valley Bank under said contract of January 27, 1912.

We also submit that the bill of complaint does not state facts sufficient to constitute a cause of action against the appellee, The Valley Bank, for the reason that it appears on the face thereof that after applying all the money received and to be received from the assets turned over to the Valley Bank of Phoenix under both contracts, set out in the bill of complaint for the purposes therein specified, there would still be a deficiency due the Valley Bank of over $36,000, as per the terms of said contracts. That the complainant could not recover any of said assets for which this suit was brought until the Valley Bank had been repaid the deficiency then due it, which, exclusive of the value of assets turned over to it under contract of December 30, 1913, is alleged in the bill of complaint to be $75,000.

The contention of the appellants that the Valley Bank was going to make a profit out of the assets turned over to it under contract of January 27, 1912, seems to us unwarranted, when it is so clearly apparent from said contract that all the parties to said contract therein conceded there was to be a deficiency. That one of the guarantors, John P. Orm, the vice president of the Union Bank and Trust Co., in said contract limited his liability to $5,000. At this proportion for the four guar-

antors there was a conceded deficiency and liability of $20,000 and it was probably on this account that it was provided that the remaining assets not converted should be returned to the guarantors paying such deficiency.

The appellant's contention as to why the Western Underwriting & Mortgage Company should purchase preferred stock in the Union Bank and Trust Company, we are not advised, for there is no evidence in the record on this subject, and in this connection we also submit that there is not sufficient evidence in this record to authorize this complainant to bring or maintain this action against this appellee, The Valley Bank of Phoenix.

The trial court very properly held at the close of plaintiff's case that irrespective of whether or not there was a contemporaneous parol agreement at the time of making the contract of January 27th, 1912, that the real complainant herein, The Union Bank and Trust Company, having in writing construed that contract on two different occasions, viz: when it executed and delivered to the Valley Bank of Phoenix its promissory note for $164,432.46, dated May 17, 1913. Also when it executed the contract of December 30, 1913, that in both instances it construed the contract of January 27, 1912, to be a security contract of The Union Bank and Trust Company to The Valley Bank of Phoenix, for the payment by the Valley Bank of the debts of said Union Bank in said contract specified. That the Union Bank had the right to construe that contract as it was actually intended to be and having done so, both the Union Bank and its stockholders are bound by that construction.

We therefore submit that on the record in this case the judgment of the trial court should be affirmed.

Respectfully submitted,

C. F. AINSWORTH,
Phoenix, Arizona.

JOS. H. KIBBEY,
Phoenix, Arizona.

Solicitors for the Appellee, The Valley Bank of Phoenix.

Dated Phoenix, Ariz., Feb. 9, 1916.

Service three copies admitted Feb. 9, 1916.

GEORGE J. STONEMAN,
Phoenix, Arizona.
Solicitor for Appellant.